

The opinion in support of the decision being entered today was not written for publication and is not binding precedent of the Board.

Paper No. 16

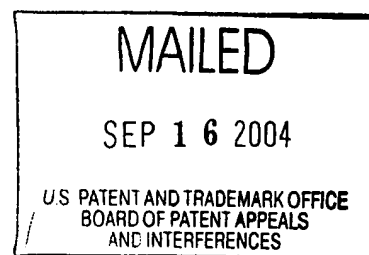
UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE BOARD OF PATENT APPEALS
AND INTERFERENCES

Ex parte MICHAEL KEANE and THOMAS MORAN

Appeal No. 2003-2065
Application 09/881,441

ON BRIEF



Before THOMAS, FLEMING, and LEVY, Administrative Patent Judges.

FLEMING, Administrative Patent Judge.

DECISION ON APPEAL

This is a decision on appeal from the final rejection of claims 1 through 23, all the claims pending in the instant application.

Invention

The invention relates to a method and apparatus for measuring speech quality of a voice call. Figure 1 is a schematic diagram of a packet-based communications network

comprising communications network nodes modified for use in Appellants' invention. Figure 2 is a schematic diagram of two of the communications network nodes of Figure 1 in more detail. Figure 3 is a flow diagram of a method carried out by one of the communications terminals nodes of Figure 2. Figure 4 is a flow diagram of a method carried out by the other communications network node of Figure 2. See page 11 of Appellants' specification. As shown in Figure 2, both node A and node B comprise a memory with stored test voice information 21. In addition, nodes A and B each have a processor 22, 23. Node A's processor 23 is arranged to add test voice information to an ongoing voice call while node B processor 22 is arranged to carry out a speech quality algorithm. See page 11 of Appellants' specification. In particular, node A's processor is arranged to identify silent periods during the voice call and to add packets comprising test voice information to the call during those silent periods. See page 12 of Appellants' specification. Node A transmits the packets for the voice call, including the test information to node B. Node B receives the packets and is able to separate the received test voice information from the real voice information. The received test voice information is inputted to a speech quality assessment algorithm together with

the stored test voice information stored at node B. The speech quality assessment algorithm produces a measure of speech quality of the particular voice call. See page 13 of Appellants' specification. In this matter, this allows a service provider to monitor the quality of the service being provided and to make adjustments to the network as necessary. See page 14 of Appellants' specification.

Claims 1 and 11 are representative of Appellants' claimed invention and are reproduced as follows:

1. A method of measuring the speech quality of a voice call between a first node and a second node in a packet-based communications network, each of the first and second nodes comprising the same stored test voice information, the method comprising the steps of, at the first node:

(i) receiving packets for the voice call and adding at least part of the stored test voice information to at least some of the packets;

(ii) forwarding the packets to the second node;

(ii)(sic) at the second node, accessing the stored test voice information at the second node and comparing it with the test voice information received in the packets using a speech quality assessment algorithm in order to obtain a measure of speech quality for the voice call.

11. A signal for a voice call provided over a packet-based communications network, said signal comprising a plurality of packets at least some of which comprise test voice information for comparison at a node with stored test voice information which is the same as the test voice information.

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References

The references relied on by the Examiner are as follows:

Lewis et al. (Lewis)	6,330,428	Dec. 11, 2001
	(Filing date	Dec. 23, 1998

Petitcolas, F. A. P. et al. (Petitcolas) "Information Hiding
--A Survey" Proceedings of the IEEE, vol. 87, no. 7, (July 1999),
pp. 1062-1078

Tschudin, C. F. "Header hopping and packet mixers".
Proceedings of the Ninth International Conference on Computer
Communications and Networks, 2000 (Oct. 16-18, 2000), pp. 316-319

Rejections at Issue

Claim 11 stands rejected under 35 U.S.C. § 102 as being anticipated by Lewis. Claim 13 stands rejected under 35 U.S.C. § 103 as being unpatentable over Lewis. Claims 1, 3, 4, 7, 8 through 10, 14 and 16 through 23 stand rejected under 35 U.S.C. § 103 as being unpatentable over Lewis in view of Tschudin. Claims 2, 5, 6, 12 and 15 stand rejected under 35 U.S.C. § 103 as being unpatentable over Lewis, Tschudin and Petitcolas.

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Throughout our opinion, we make reference to the briefs¹ and the answer for the respective details thereof.

OPINION

With full consideration being given to the subject matter on appeal, the Examiner's rejections and the arguments of Appellants and the Examiner, for the reasons stated *infra*, we affirm the Examiner's rejection of claim 11 under 35 U.S.C. § 102 and claim 13 under 35 U.S.C. § 103. However, we reverse the Examiner's rejection of claims 1 through 10, 12 and 14 through 23 under 35 U.S.C. § 103.

Rejection of claim 11 under 35 U.S.C. § 102

"Anticipation is established only when a single prior art reference discloses, expressly or under principles of inherency, each and every element of a claimed invention." *RCA Corp. v. Applied Digital Data Sys., Inc.*, 730 F.2d 1440, 1444, 221 USPQ 385, 388 (Fed. Cir.) **cert. dismissed**, 468 U.S. 1228 (1984),

¹Appellants filed an appeal brief on October 30, 2002. Appellants filed a reply brief on April 21, 2003. The Examiner mailed an office communication stating that the reply brief has been entered into the record on May 7, 2003. In response to an order to correct the appendix, Appellants filed a supplemental corrected appendix on July 7, 2003. The supplemental corrected appendix provide the claims that are properly before us for our consideration.

citing **Kalman v. Kimberly-Clark Corp.**, 713 F.2d 760, 772, 218 USPQ 781, 789 (Fed. Cir. 1983).

Appellants argue that Lewis does not teach having stored test voice information at each node in the network. See pages 5 and 6 of the brief.

As pointed out by our reviewing court, we must first determine the scope of the claim. "[T]he name of the game is the claim." In **re Hininker Co.**, 150 F.3d 1362, 1369, 47 USPQ2d 1523, 1529 (Fed. Cir. 1998). Claims will be given their broadest reasonable interpretation consistent with the specification, and limitations appearing in the specification are not to be read into the claims. In **re Etter**, 756 F.2d 852, 858, 225 USPQ 1, 5 (Fed. Cir.), **cert. denied**, 474 U.S. 828 (1985).

We note that Appellants' claim 11 recites "[a] signal for a voice call . . . comprising a plurality of packets at least some of which comprises test voice information." We further note that the claim recites that the signals comprises "test voice information for comparison at a node with stored test voice information which is the same as the test voice information." The question is whether this language is further limiting to the claim. We note that Appellants have claimed a signal and not a method. Thus, the language in the claim "for comparison at a

node with stored test voice information which is the same as the test voice information" are terms which merely set forth the intended use of the signal and do not further limit the characteristic of the claimed signal. Terms merely setting forth intended use, or a property inherent in, an otherwise old composition do not differentiate the claimed composition from those known in the prior art. **See In re Pearson**, 494 F.2d 1399, 1403, 181 USPQ 641, 644 (CCPA 1974).

We further note that Appellants' claim 11 recites "said signal comprising a plurality of packets at least some of which comprise test voice information." We note that the term "at least some" does not preclude a signal that comprises a plurality of packets all of which comprise test voice information.

Lewis teaches in Figure 1B a packet data network 156 having interconnected with voice terminals 154 and 158 with voice quality performance evaluator 152 connected to both 154 and 158. See column 5, lines 32 through 50. Lewis teaches that the operation of a test of Figure 1B proceeds according to the operations described with reference to Figure 1A. See column 5, lines 51 through 53. Lewis teaches that voice samples are transmitted from the VQPE 152 to voice terminal 154, which codes

the voice samples and then transmits them to packet network 156. The packet data network then returns the coded voice samples to STET voice terminal 158 for decoding. The decoding process produces the modified voice samples which are returned to the VQPE 152. The VQPE then processes the modified voice samples to evaluate the performance of the voice terminal 154. See Lewis, column 5, lines 53 through 62. Thus, Lewis teaches a signal for a voice call provided over a packet-based communications network, said signal comprises a plurality of packets, at least some of which comprise test voice information as required by Appellants' claim 11. Therefore, we find that Lewis teaches all of the limitations as recited in Appellants' claim 11.

Appellants argue that the test voice signal of Lewis does not comprise any actual speech signals for a communication session between a calling and a called party as is the case in a voice call. See page 6 of the brief.

As we have pointed out above, the scope of Appellants' claim 11 only requires a signal having a plurality of packets comprising test voice information. As we have shown above, Lewis teaches this limitation.

Appellants argue that claim 11 clearly indicates that the signals of the voice call and the test data are transmitted along the same path at the same time and is an important feature of the invention not disclosed in Lewis. See page 2 of the reply brief.

As pointed out above, we fail to find that the Appellants' claimed scope requires that the signal of the voice call and the test data are transmitted along the same path at the same time. As pointed out above, Appellants simply claimed a signal comprising a plurality of packets, at least some of which comprises test voice information. We fail to find that the claim requires the limitations as argued.

Rejection of Claim 13 under 35 U.S.C. § 103

Appellants state that claim 13 is dependent on claim 11, which is patentable over Lewis for the reasons given above. No other argument is presented. See page 10 of the brief.

37 CFR § 1.192(a) states:

Appellant must, within two months from the date of the notice of appeal under § 1.191 or within the time allowed for reply to the action from which the appeal was taken, if such time is later, file a brief in triplicate. The brief must be accompanied by the fee set forth in § 1.17(c) and must set forth the authorities and arguments on which appellant will rely to maintain the appeal. Any arguments or authorities not included in the brief will be refused consideration by the Board of Patent Appeals and Interferences, unless good cause is shown.

Thus, 37 CFR § 1.192 provides that only the arguments made by Appellants in the brief will be considered and that failure to make an argument constitutes a waiver on that particular point. Support for this rule has been demonstrated by our reviewing court in *In re Berger*, 279 F.3d 975, 984, 61 USPQ2d 1523, 1528-29 (Fed. Cir. 2002), wherein the Federal Circuit Court stated that because the Appellant did not contest the merits of the rejections in his brief to the Federal Circuit Court, the issue is waived. Therefore, since we sustain the Examiner's rejection of claim 11, we will sustain the Examiner's rejection of claim 13 for the same reasons.

**Rejection of Claims 1 through 10, 12 and 14 through 23
under 35 U.S.C. § 103**

Appellants argue that Lewis fail to teach "receiving packets for the voice call and adding at least part of the stored test voice information to at least some of the packets" as recited in Appellants' claim 1. Appellants also point out that in regard to independent claims 14, 16, 17, 18, 19, 20 and 21, these claims include this limitation as well and therefore are patentable over Lewis in view of Tschudin for the same reasons as given for claim 1. See pages 7 and 8 of the brief.

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In rejecting claims under 35 U.S.C. § 103, the Examiner bears the initial burden of establishing a **prima facie** case of obviousness. In **re Oetiker**, 977 F.2d 1443, 1445, 24 USPQ2d 1443, 1444 (Fed. Cir. 1992). See also In **re Piasecki**, 745 F.2d 1468, 1472, 223 USPQ 785, 788 (Fed. Cir. 1984). The Examiner can satisfy this burden by showing that some objective teaching in the prior art or knowledge generally available to one of ordinary skill in the art suggests the claimed subject matter. In **re Fine**, 837 F.2d 1071, 1074, 5 USPQ2d 1596, 1598 (Fed. Cir. 1988). Only if this initial burden is met does the burden of coming forward with evidence or argument shift to the Appellants. **Oetiker**, 977 F.2d at 1445, 24 USPQ2d at 1444. See also **Piasecki**, 745 F.2d at 1472, 223 USPQ at 788.

An obviousness analysis commences with a review and consideration of all the pertinent evidence and arguments. "In reviewing the [E]xaminer's decision on appeal, the Board must necessarily weigh all of the evidence and argument." **Oetiker**, 977 F.2d at 1445, 24 USPQ2d at 1444. "[T]he Board must not only assure that the requisite findings are made, based on evidence of record, but must also explain the reasoning by which the findings are deemed to support the agency's conclusion." In **re Lee**, 277

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F.3d 1338, 1344, 61 USPQ2d 1430, 1434 (Fed. Cir. 2002). With these principles in mind, we commence review of the pertinent evidence and arguments of Appellants and Examiner.

As pointed out above, we found that Lewis teaches providing a test voice information signal to a packet data network. However, we fail to find that Lewis teaches receiving packets for the voice call and adding at least part of the stored test voice information to at least some of the packets as recited in Appellants' claim 1. Furthermore, we note that the remaining claims also recite similar limitations. Furthermore, we fail to find that Tschudin or Petitcolas teaches this limitation as well. Therefore, we will not sustain the Examiner's rejection of claims 1 through 10, 12 and 14 through 23.

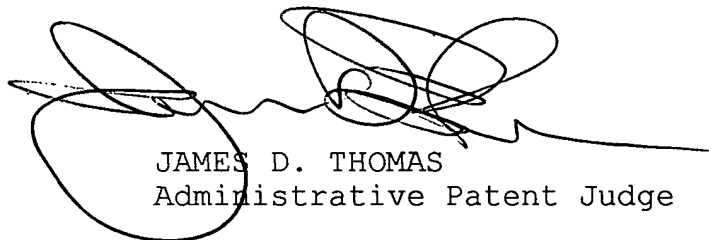
Conclusion

We affirm the Examiner's rejection of claim 11 under 35 U.S.C. § 102 and we affirm the rejection of claim 13 under 35 U.S.C. § 103. However, we reverse the Examiner's rejection of claims 1 through 10, 12 and 14 through 23.

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No time period for taking any subsequent action in
connection with this appeal may be extended under 37 CFR
§ 1.136(a).

AFFIRMED-IN-PART



JAMES D. THOMAS
Administrative Patent Judge



MICHAEL R. FLEMING
Administrative Patent Judge



STUART S. LEVY
Administrative Patent Judge

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